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EXEMPTION LAWS AND PUBLIC POLICY.

In the history of the law of the English peoples the varying extent to which a creditor may subject the person and property of his debtor to execution in satisfaction of his claim has reflected prevailing principles of public policy. The relation of debtor and creditor creates a liability on the part of the person and estate of the debtor for the satisfaction of the demands of the creditor, exemption from which is procured not by reason of any special merit in the debtor personally or in his position as debtor, or by reason of any especial unworthiness of the creditor, but in spite of the merits of his position and for reasons which concern the well-being of the body politic. The interests of the state or of society, as a whole, in maintaining the individual as an efficient unit, are in conflict with the narrow interests of the creditor seeking satisfaction from the person or estate of his debtor.

Upon the degree to which the peculiar interests of the creditor or commercial class predominate in moulding public policy and legislation, depends, in great part, the scope of execution. When England was a military or feudal

state, whose interests were best subserved by the prevention of the impairment of the efficiency of any of its individual members, there was wide exemption of person and estate from execution. As England developed from a feudal into a commercial state, the creditor class was given greater security, in the increasing objects of execution, until there was virtually no limitation whatever upon the liability of both the person and estate of the debtor to the satisfaction of the creditor's claim. With the modern evolution of benevolent and altruistic principles insisting that the well-being of the state will not admit of the impairment of the efficiency of the individual, by his imprisonment or complete impoverishment, to meet the demands of a creditor, the scope of execution was limited. The exemption laws were the means by which, pursuant to the predominant principles of public policy, the person of the debtor was almost entirely, and his estate partially, relieved from liability for his debts.

In the early stages of the common law, when the institutions of feudalism were at their height, execution was restricted to personal property, with some rare exceptions in favor of the crown, which could, under certain circumstances, seize the person or lands of its debtors. The militarism of the feudal state, subordinating all other interests to those dictated by the necessity of defence against foes, preserved the persons and lands of the great majority of debtors from execution. The personal duties owed by the vassal to the lord, and the paramount obligation to hold himself ever ready to attend his lord in his military enterprises or assist him in his defence, procured for the person of the vassal immunity from imprisonment for debt. Similarly the old feudal system of land tenures, under which the lord parcelled out his estate to his military retainers, who held only at the will of the lord, was incompatible with an execution against land, by virtue of which possession of land might be transferred from a loyal and soldierly tenant to one physically unfit to perform military services or lacking in loyal fealty to his lord.

The so-called common-law writs of execution were the

feri facias and the *levari facias*, the former against the debtor's goods, the latter against the present profits of his lands in addition to his goods. It was only with the decline of feudalism and the growth of the towns and of commerce that creditors were accorded increased rights against their debtors' persons and estates. When the lord found it cheaper and more advantageous to depend upon hired soldiers, rather than upon feudatories, perhaps incapable of bearing the burdens of war or else engaged in necessary farming, and as the money for their hire came to be advanced by the increasingly influential money-lending and commercial classes of the rising towns, and as the restrictions on the alienation of land wore away, so, too, did the restrictions upon the availability of land and of the person of the debtor for execution in satisfaction of debt wear away; and the demands of the creditor class for increased security were met by a number of statutes bringing the debtor's person and lands within the grasp of the creditor.

The *capias ad satisfaciendum* was first allowed in civil actions for torts producing a breach of the peace. It was then extended to cases of frauds, and by Statutes 52 Henry III and 13 Edw. I to actions of account. By Statute 25 Edward III it was granted in actions of debt and detainee; and finally by Statute 19 Hen. VII, allowing it to issue in actions on the case, the remedy became a general one in enforcing the collection of debts.

Execution against land, entitling the creditor to take possession of his debtor's real estate was secured only by a number of statutes passed at intervals during a long period of time. The Statute of Westminster 2, 13 Edw. I, c. 18, gave to the creditor the choice of a *feri facias* or of a new writ, known as an *elegit*, so called from the choice accorded the plaintiff, under which writ if the defendant's goods were insufficient to satisfy the judgment, the plaintiff was put in possession of one-half the debtor's freehold lands, to be held by him until out of the rents and profits thereof, the debt was paid. A broader remedy was provided for traders by the Statute of Acton Burnel de Mer-

catoribus, passed the same year, 13 Edw. I. Under this act a recognizance could be entered into by a debtor for debts contracted in the course of trade before the Mayor of London or chief warden of another city, and upon default, the body and goods of the debtor were subject to execution, and an extent was issuable delivering to the plaintiff the whole of the defendant's lands, to be held by the plaintiff until he had made his claim out of the rents and profits. This remedy was known as the Statute Merchant. Of a similar nature was the remedy provided, also for traders, by Statute 27 Edw. III, c. 9, known as the Statute Staple, under which a recognizance was entered into before the chief magistrate of any staple or grand mart of the leading manufactures or commodities. The Statute of 23 Hen. VIII, c. 6, extended the remedies of the Statutes Merchant and Staple to all the subjects of the kingdom, providing a remedy called a "Recognizance in the Nature of a Statute Staple."

As a result of this legislation, by the early part of the sixteenth century, a debtor became liable to imprisonment, and his lands as well as goods became answerable, for his debts. The growing power and influence of the rising commercial classes had beaten down the restrictions imposed on execution by the necessities of feudalism; and the predominance of that power continued the rigor of the law practically unabated for four centuries, until the nineteenth. During this period there were substantially no exemptions from executions. Executions consumed the whole of the debtor's estate and inflicted upon his person a punishment more severe than was meted out for the commission of many crimes. Necessary wearing apparel in use was exempt, but the law admitted of no evasion by a liberal construction of the amount of apparel that might be conceived to be "necessary." If a man had two gowns, one of them could be levied upon.¹

The insolvency statutes were the first sources of alleviation of the debtor's condition; providing him with a means of obtaining release from imprisonment for debts. The

¹ Holt in *Hardistley v. Barney*. Comb. 356.

Statute of 32 Geo. II, c. 28, enabled the imprisoned debtor to secure his release, if taken in execution for a debt not exceeding one hundred pounds, by the surrender of all his property except a small quantity of bedding, wearing apparel and tools which he was permitted to retain. The act testifies to the wretched conditions that prevailed in the debtors' jails, where it depended upon the kindness of the prisoner's friends or the charity of strangers to afford him proper sustenance. Under this statute, despite the debtor's offer to surrender his property, the creditor could still insist upon his detention by allowing a weekly pittance of 2s. 4d. for his support. This statute was followed by others whose provisions extended to an ever-widening class of imprisoned debtors, and afforded them in insolvency proceedings means for release from imprisonment. Such insolvency laws were general throughout this country at the time of the adoption of the Constitution.

The next phase of the humanitarian movement in the relief of debtors from the drastic operation of the various writs of execution was the passage of a number of laws during the period from the end of the eighteenth until the fourth decade of the last century, exempting from execution on *fiery facias* a portion of the debtor's personal property. These statutes were kindled, in the main, by the desire to secure the debtor from total impoverishment and the consequent crippling of his power to sustain himself and his family, without greatly impairing the efficacy of the writ or the value of the remedy for creditors. The exemption extended to such articles as wearing apparel, Bibles, school books, specific pieces of household furniture and farming implements and the like. The Pennsylvania Statute of 1849 is a fair illustration of these laws, exempting Bibles, school books, wearing apparel and \$300 worth of property to be selected by the debtor. Under these personal property exemption laws, for the first time could a debtor save from sale under a *fiery facias* any of his goods and chattels. From the earliest times hitherto, the *fiery facias* subjected the whole of a debtor's personalty to liability for his debts.

At about the same time the agitation for legislation to abolish imprisonment for debt bore fruit. In Alabama in 1839, in Pennsylvania in 1842, and in other states at about that period, statutes were passed putting an end to imprisonment for debt, and in England at about the time of the publication of Dickens' "Little Dorrit," a law was enacted in Parliament, abolishing imprisonment for debt, that made impossible the recurrence in real life of the pitiful scenes of the debtors' prison portrayed in that work.

The debtor's real estate was the last field into which this philanthropic spirit led legislation in restricting the scope of execution. Through the peculiarly American laws, known as the "Homestead Laws," a debtor's home with its environing land was exempted from levy and sale. The first of the Homestead laws was passed in 1839 in Texas, while an independent state after its secession from Mexico and prior to its annexation to this country. Similar laws are, to-day, found upon the statute books of about half the states.

Thus by the middle of the last century all the modern forms of exemption from execution had taken shape. The exemptions of the early feudal period were due not to saving provisions limiting the extent of the operation of writs, but to the scanty remedies the then few writs of execution afforded. Only personal property was available for execution. Land and the persons of debtors were not objects of execution. Hence their exemption was complete. With the change in institutions from a feudal to a commercial state, land and the bodies of the debtors were made the objects of new writs of execution. The unlimited operation of these writs, however favorable to the creditor or commercial classes, was yet detrimental to the best interests of the state. Completely to impoverish a debtor, and thus turn him and perhaps his family into a burden upon the public, and indefinitely to imprison him, and both not only without producing any satisfaction of the debt, but even rendering its satisfaction impossible from the destruction of the debtor's opportunities and means of working out its satisfaction, were

remedies that might have enabled a creditor to wreak his vengeance upon a debtor, but were manifestly too harsh for a society sensitive of the welfare of its members and alive to its own best interests. Corrective legislation was required to restrict the boundless scope of execution, and this was had by 1850. By that time imprisonment for debt had been generally abolished, and such exemptions of real and personal property were enacted as secured the debtor, assured of his liberty, relief from total impoverishment, and sufficient means to enable him with proper industry to support himself and family, and perhaps eventually pay his debts.

In this, as in many another field of the law, is evident the tendency of a popular legislature, once started on a new course of action, to pursue it until the original justifying reasons are lost sight of, and special interests, regardless of the limitations the true basis of the legislation imposes, lead it to extravagances that bring the whole system into reproach. In many of our states exemption law has followed exemption law, and constitutional enactment has intervened to prevent a reaction, that would lead one to believe that the legislature and the people of those states intended to relieve all but the wealthiest members of the community from liability for their debts. In Alabama a homestead of the value of \$2,000, and personalty to the value of \$1,000, in addition to wearing apparel and wages, are exempt. In Arizona a homestead to the value of \$2,500, and personalty worth \$500 are exempt. In Illinois the head of the family is entitled to an exemption of a homestead valued at \$1,000, and of personalty worth \$400. In Missouri the heads of families in large cities may claim exemption of \$500 worth of personalty, and a homestead worth \$3,000. These are not isolated instances. Many of the other states are as liberal to their debtors. At the other extreme are Pennsylvania and Maryland. In neither is there any homestead exemption. In the former the debtor can save from execution \$300 worth of his property, real or personal, besides wearing apparel, school books in actual use, and the Bible. In Maryland the

exemption is of only \$100 worth of property. The exemption laws of the western and southern states are comparatively recent. The present exemption law of Pennsylvania dates back to 1845;² in Maryland to 1861.³ The course of legislation indicates that the more recent the law, the more other than the original reasons for exemption laws guide legislative action. The relief of debtors from impoverishment seems to have been attained in Pennsylvania as early as 1845 by a law exempting but \$300 worth of property. Some other purpose is evidently sought by legislation or constitutional provision under which is exempted property to the value of \$2,500 or \$3,000, sums several times the average wealth of the individuals of the state.

It is in the Western and Southern states that the exemption and homestead laws are most liberal to debtors. After the civil war the Southern states, in their new constitutions and statutes, restricted the scope of execution by their extensive exemptions in order to enable their citizens to rebuild their shattered fortunes, and enjoy such freedom from the efforts of creditors to obtain satisfaction as would enable them to accomplish this object. They were distinctively debtor states; and their laws were distinctively debtors' laws. Other motives inspired equally liberal exemptions in the West. With ample territory but sparsely settled, these states held out as an inducement to emigration from the East the boon of a large homestead that could not be reached by creditors, and thus assured to new residents a permanent home. In the competition between states to protect their own citizens against non-resident creditors, and to attract citizens to settle upon and develop great areas of uncultivated lands, the exemption laws of the South and West waxed broader and broader; the rights of creditors were forgotten and the vicious effect of such laws upon their own citizens was ignored.

To relieve a man from the performance of his obligations is a sure way to lower his character, and when this is ac-

² Act of Assembly April 9th, 1849, P. L. 533.

³ Laws 1861, chap. 7, sec. 2.

complished by general laws that all debtors may invoke to defeat creditors, the moral tone of the whole community will suffer. It is not in the wrong done the creditors that excessive exemption laws are most harmful in effect, but in the lowered standard of commercial honesty which they foster. Credit will be cautiously granted where collection is difficult, and thus in a measure the creditor class can protect itself from financial loss; but the undermining of the honest determination to pay a debt, and the encouragement to the shirking of obligations, ending perhaps in deliberate attempts to defraud creditors, are results of laws which place a man's property to the value of two or three or more thousands of dollars beyond the reach of creditors that cannot be obviated.

Not the least of the evils consequent on an excessive exemption is the disrepute into which it brings the efficacy of the processes of the law. The practical difficulty of collecting debts by reason of the "outrageous liberality" of the exemption laws, in several of the states, has led the professors of the law itself to propound the serious jest that in those jurisdictions the laws would be simplified by statutes abolishing actions of *assumpsit* or providing that no debt shall be collected by action.⁴ There is sound public policy in an exemption of sufficient of a man's estate to save him and his family from utter want, and to enable him to continue the struggle for existence; but there is insidious evil in exemption laws which do more than this.

The decisions declare that there are two objects to be achieved by a sound exemption law, the one having regard to the protection of the family of the debtor, the other to the protection of the debtor himself, from total impoverishment. In *Leavitt v. Metcalf*, 2 Vt. 342 (1829), Judge Turner said, in speaking of the exemption law of Vermont: "It is properly a remedial statute, evidently intended to prevent families from being stript of the last means of support, and left to suffer, or cast as a burden upon the public; and to rescue them from the hands of unfeeling creditors; and the better

⁴ See "Chicago Legal News," vol. 16, p. 160 (1884). Address before Ark. St. Bar Assn.; Ark. St. Bar Assn. Rep., 1887, p. 40.

to enable such poor debtors to satisfy the just demands against them." The statutes of the several states are variously framed to accomplish these objects. In some only "householders" or "heads" of families are entitled to claim exemption; in others broader provision is made for heads of families than for other debtors; while in still other states the exemption is allowed to all debtors alike.

In New York, a personal property and homestead exemption is extended to "householders." Others are entitled to no exemption. Such a law, Judge Parker says, in *Griffin v. Sutherland*, 14 Barb. 456 (1852), "was made for the benefit of the family, rather than its head, the debtor. Its object concerns a question of public policy. It is to keep together the wife and children, that the latter may be trained and educated to become useful members of society; to protect them against the dangers to which they would be exposed by being scattered, at a tender age, and to secure them the means of instruction and improvement." That many of the states, other than New York, make the family the paramount object of their solicitude is manifest in their laws. The "head of the family" or "householder" is alone entitled to exemption in Arizona, Georgia, Indiana and Virginia; while in New Jersey, a "person of family" is the only one who may claim the benefit of the exemption law. In the majority of the states provision is made for all debtors, but the exemption allowed unmarried men upon whom no family is dependent for support is less liberal than that extended to debtors who support a family. Thus, in Missouri, to the head of a family is exempted personalty to the value of \$500, and a homestead worth from \$1,500 to \$3,000, according to its location; while one not the head of a family may claim only wearing apparel, and necessary tools and implements of trade. In Illinois, necessary wearing apparel, Bibles, school books and family pictures and \$100 worth of other personal property are exempt from execution against any debtor, but when issued against a debtor who is the head of a family residing with it, he may claim in addition

\$300 worth of other property, and, if a householder of family, a homestead worth \$1,000.

Pennsylvania is a type of the remaining class of states, wherein the statutory exemption is allowable to all debtors alike, whether they be men of family or bachelors. The policy of such laws was explained in *Snow v. Dill*, 13 Phila. 138 (1878), by Judge Thayer. He said: "All laws of this character may be said to constitute a system of poor laws for the state to be intended for the protection of the poor of our own state. . . . Except for the protection afforded by these laws to our own people many debtors might be reduced to such a state of destitution as to make it necessary to subsidize them at the public charge."

The exemption laws seem thus to be founded upon sound principles of public policy. Whether framed with a view to the protection of families alone, or contemplating the protection of the debtor himself besides, these laws are an expression of the regard of the state for its own highest interests, in preserving the efficiency of its citizens from total impairment. When exemption laws so far restrict the scope of execution as to accomplish more than this, they unduly limit the rights of creditors, with mischievous results in debasing commercial and moral standards and bringing the efficacy of the processes of the law into disrepute. Such excessive exemptions cannot be justified. On the other hand, the exemption laws should be broad enough and should be so construed as to accomplish their object. The right of a creditor to complete satisfaction is one that the law should permit to be pursued to the fullest extent, saving only that in its pursuit, for its own welfare, the state should not permit the debtor to be so far impoverished as to render him and those dependent upon him a charge upon the community without the means of subsistence or of continuing at some gainful occupation.

Each of the states has an exemption law, which, if enforced so as assure to every debtor the benefit of its provisions under all circumstances, is amply sufficient to protect the debtor and his family. In the vast majority of the states,

no executory agreement of the debtor to waive the exemption is upheld. Such a contract is regarded as contravening public policy, and hence void as being illegal. The broader interests of the state will not admit of the enforcement of such a contract, whatever be the peculiar interests of the parties thereto leading to its formation. While this is generally the law, there are some states in which a contrary rule obtains, under which legal sanction is given to executory agreements waiving exemption. In Alabama the constitution and statutes of the state⁵ provide that no waiver of exemption shall be effective unless in writing, and, if it relates to real estate, unless signed by husband and wife and witnessed. In Georgia the constitution⁶ permits a debtor to waive exemption by a writing, but no waiver shall extend to wearing apparel and \$300 worth of household goods, kitchen furniture and provisions. In Illinois⁷ waiver of the homestead exemption by executory agreement is valid only when reduced to writing subscribed by the householder and his wife, and acknowledged like a deed. In the same state it is determined by judicial decision that executory agreements waiving exemption as to personalty are valid if made by an unmarried man;⁸ but are void as against public policy if made by a married man.⁹ This distinction is founded upon the evident policy of the exemption laws of the state in seeking to protect families rather than unmarried individuals. As heretofore noted, the Illinois laws extend a far more liberal exemption to householders and men who are heads of families than to debtors not so circumstanced.

Pennsylvania, it is believed, is the only state wherein, without statutory or constitutional countenance, but solely by judicial construction, it is held that executory agreements waiving exemption are enforceable by whatsoever class or character of debtor made. It is difficult to sustain such con-

⁵ Alabama Constitution, Art. X, Sec. 7. Code Sec. 2104 *et seq.*

⁶ Art. 9, Sec. 3.

⁷ Laws 1873, p. 99. Earlier law was the same: L. 1851, p. 25.

⁸ *Porvell vs. Dailey*, 163 Ill. 646 (1896).

⁹ *Recht vs. Kelly*, 82 Ill. 147 (1876).

struction. When it is borne in mind that the exemption laws are passed from the highest motives of public policy, it would seem that it were beyond the power of the individual to set the object of those laws at naught and make possible the very consummation they were designed to prevent. It is true that in many of the states the exemption laws may fail of their object by reason of the neglect of the debtor to claim their benefit after execution has been levied. In others of the states the exemption law is self-acting. The property exempt is not subject to execution. In these states the possible neglect on the part of the debtor to claim exemption is guarded against. The Pennsylvania Statute is not so worded as to withdraw exempt property from execution. The statute becomes operative only if its provisions are invoked by the debtor. If no claim for exemption is made, the exigency of the execution may extend to the last article of property the debtor owns. In a sense, this is a waiver of exemption; and it was, perhaps, with the knowledge of the sanction given this form of waiver in mind that the courts of Pennsylvania upheld the validity of executory agreements waiving exemption. The leading case is *Case v. Dunmore*, 23 Pa. 93, decided in 1854, five years after the enactment of the exemption law it construed. Judge Lewis there said:

“It has been repeatedly decided by this court that the exemption of goods from execution under the act of 1849 is a privilege for the benefit of the debtor which he may waive even by the omission to claim it at the proper time, without any express contract for the purpose. But where at the time of contracting the debt he agrees to waive the benefit of the exemption, and this forms the ground of the credit given to him, the injustice of permitting him to violate his contract and thus to defraud his creditor, is too palpable to need illustration, or to require the aid of precedents to discountenance it. Notwithstanding the benevolent provisions of the statute in favor of unfortunate and thoughtless debtors, it was far from the intention of the legislature to deprive free citizens of the State of the right, upon due deliberation, to make their own contracts in their own way, in regard to securing the payment of debts honestly due. Creditors are still recognized as having some rights, and it was not the intention of the legislature to destroy them by impairing the obligation of contracts. It frequently happens that the creditor is more in need of public sympathy than the debtor. When a poor man is unjustly kept out of money due to him, the distress arising from the want of it is often greater than that caused to the other party by its collection. If the suffering was but equal, it is plain that one man should not suffer for the follies or misfortunes of another. Every one should

bear his own burthen. The statute which exempts debtors from the operation of this principle, did not take away from them the right to waive the privilege thus conferred whenever their consciences or their necessities prompted the waiver.”¹⁰

These are the words of a man impressed with the sense of personal obligation and duty. The spirit in which the opinion is conceived is admirable in the individual, but perhaps not sufficiently broad for the formulation of a rule which should bind all debtors. The exemption laws were conceived from a regard for the weakest of the citizens of a state to prevent their reduction to a condition of complete want, and to prevent their becoming charges upon the public. Their necessities at a time when entering into a contract might, and often undoubtedly do, lead them into offering extravagant inducements to a creditor or into submitting to the imposition of ruinous terms. If excessive interest is contracted for, under such circumstances, the law does not hesitate to strike down the excess, and thus brush aside the contract of the parties, and in effect limit their capacity for contracting. Why should not the exemption laws be enforced in the same manner as the laws against usury? Reasons of public policy are the basis of each, and not even the necessities of debtors should be permitted to validate contracts that render the provisions of such laws nugatory. Indeed, it is against the consequences of their necessities that the law chiefly aims to protect debtors. A man cannot contract away his liberty. He should not be permitted to bargain away the last dollar's worth of property wherewith he might have procured food and raiment for himself and family.

When a man, or one of his family who have the right to make the claim for him, omits to claim exemption when execution is levied against him, it is safe to assume that they can afford the waiver. Unless the statute is framed in such wise as to be self-operative, by the absolute denial of the right to levy execution against exempted property, its bene-

¹⁰ See similar reasoning of Judge Thompson in *Smiley v. Bowman*, 3 Gr. (Pa.) 132 (1861), and *Bowman v. Smiley*, 31 Pa. 225 (1858); and of Judge Strong in *Line's app.* 2 Gr. (Pa.) 197 (1858).

ficent provisions can be enjoyed when execution is levied only by claiming their benefit. A waiver of the claim at such time is an omission against which the law cannot guard, and is obviously a totally different thing from an executory contract of waiver, which can be enforced against the will of the debtor when the levy is made only by the intervention or with the sanction of the law. The reckless indifference with which a debtor will sign a waiver upon assuming an obligation, his heedlessness of consequences at such a time, and over-confident assurance of ability to meet his obligations at maturity, place him at the mercy of an exacting creditor. When the contractual exactions of a creditor in other respects contravene the policy of the law, they are unenforceable. There is no reason why the law should be less effective in avoiding contracts which contravene its policy as declared in the exemption laws.

Outside of Pennsylvania these views have received general expression. There are abundant decisions of the courts of nearly all the states in which the invalidity of executory waivers is demonstrated. One of the ablest may well be quoted at length. In *Kneetle v. Newcomb*, 22 N. Y. 249 (1860), Judge Denio says:

"The statutes which allow a debtor . . . to retain, as against the legal remedies of his creditors, certain articles of prime necessity, to a limited amount, are based upon views of policy and humanity, which would be frustrated if an agreement like that contained in these notes, entered into in connection with the principal contract, could be sustained. A few words contained in any note or obligation would operate to change the law between those parties, and so far disappoint the intentions of the legislature. If effect shall be given to such provisions, it is likely that they will be generally inserted in obligations for small demands, and in that way the policy of the law will be completely overthrown. Every honest man who contracts a debt expects to pay it, and believes he will be able to do so without having his property sold on execution. No one worthy to be trusted would, therefore, be apt to object to a clause subjecting all his property to levy on execution in case of non-payment. It was against the consequences of this over-confidence, and the readiness of men to make contracts which may deprive them and their families of articles indispensable to their comfort, that the legislature has undertaken to interpose.

"When a man's last cow is taken on an execution on a judgment rendered upon one of these notes, it is no sufficient answer to say that it was done pursuant to his consent, freely given, when he contracted the debt. The law was designed to protect him against his own

improvidence in giving such consent. The statutes contain many examples of legislation based upon the same motives. The laws against usury, those which forbid imprisonment for debt, and those which allow a redemption after the sale of land on execution are of this class. . . . In these cases the law seeks to mitigate the consequences of men's thoughtlessness and improvidence, and it does not, I think, allow its policy to be evaded by any language which may be inserted in the contract. It is not always equally careful to shield persons from those acts, which, instead of being promissory in their character and prospective in their operation, take effect immediately. One may turn out his last cow on execution, or may release an equity of redemption, and he will be bound by the act. In thus discriminating the law takes notice of the readiness with which sanguine and incautious men will make improvident contracts which look to the future for their consummation, when, if the results were to be presently realized, they would not enter into them at all. . . .

"The maxim *modus et conventio vincunt legem* is not of universal application. It applies only to agreements in themselves legal. Where no rule of law or principle of public policy is concerned, the parties may by contract make a law for themselves. One object of the municipal law is to promote the general welfare of society. The exemption laws seek to accomplish by taking from the head of the family the power to deprive it of certain property by contracting debts which shall enable the creditors to take such property on execution. The parties to this contract sought to set aside those laws, so far as this debt was concerned. This they could not do." ¹¹

That the validity of executory waivers of exemption is still upheld in Pennsylvania attests to the force of the principle of *Stare decisis*. The courts of that state have long since expressed regret that broader views of the question were not taken when it first came up for decision. In *O'Neil v. Craig*, 56 Pa. 161 (1867), Judge Strong said:

"Had it been determined, immediately after the passage of the Act of April 9th, 1849, that a debtor could not deprive himself of that exemption from execution of a portion of his property allowed by the statute, by any agreement made at the time the debt was created, the object of the legislation would doubtless have been better secured." ¹²

The construction of the exemption laws which admits of their waiver by executory agreement ignores the principles of public policy which alone justify those laws. • In effect,

¹¹ For other expressions of opinion in accord with that of Judge Denio, see *Miles v. Bennett*, 94 Tenn. 651 (1895); *Carter v. Carter*, 20 Fla. 558 (1884); *Maxley v. Ragan*, 10 Bush (Ky.) 158 (1874); and *Recht v. Kelly*, 163 Ill. 646 (1896).

¹² See also Shelly's app., 36 Pa. 373 (1860); *Firmstone v. Mack*, 49 Pa. 393 (1865); and *Garretson v. Felix*, 6 Kulp 211 (1892).

this narrow construction is as vicious as is the extreme liberality of the statutes in other states. In the latter case the creditors, in the former case the community itself, may suffer. In either case the debtor is subjected to strong temptations leading to fraud. Where exemptions are too liberal, their effect on debtors has been noted. Where the construction of the law is narrow, it drives the debtor, who seeks to escape the impoverishment the law admits of, to resort to all the familiar devices intended to withdraw his property from the reach of creditors. Concealment of assets and the inevitable property claim by third persons are the consequences of the narrow construction of exemption laws, which sanctions their waiver by executory agreement.

The extent and the construction of the exemption laws should be determined by the purposes those laws were intended to accomplish. For the benefit of creditors, and after a long evolution, the whole of a man's estate and his person, as well, were subjected to various writs of execution. The exemption laws were a reaction against such drastic remedies, designed for the protection both of the state and of the individual debtor and his family, and were not intended to restrict the creditor's rights any further than was necessary to maintain the independence and freedom of a debtor and preserve his ability to support himself and his family. Their benevolent purposes should neither be abused by outrageously liberal statutory enactments, nor frustrated by narrow judicial construction.

Stanley Folz.